

REMARKS

1. Status of Claims and Formal Matters

a. Amendments

Claims 2, 5, 7-9, and 17-21 are pending in the application. Claims 1, 4, 10, 13, 14, and 16 are withdrawn. Upon entry of these amendments, claims 2, 5, 7-9, and 17-21 are pending and under active consideration. Applicant respectfully requests entry of the remarks made herein into the file history of the present application.

Claim 1 is amended to recite that the nucleic acid is from about 91 to about 120 nucleotides, support for size can be found in the specification at paragraph 0011, and the SEQ ID NO: 1.

2. Election

At page 2 of the Office Action, the Examiner requires restriction to a single invention. The Examiner alleges that the claimed DNA and RNA products are distinct in that they do not overlap in scope, they are not capable of use together, and they have materially different designs, modes of operation, function and effect. Applicant respectfully traverses the invention election requirement. In compliance with 37 C.F.R. § 1.143 Applicant provisionally elects invention II. To clarify the record Applicant respectfully requests the Examiner enter in the record that the current pending claim set includes linking claims, specifically 19, 20 and 21, that link inventions I and II.

a. Error in Restriction Requirement

Restriction of divisible inventions is proper, but when the application has claims to two or more properly divisible inventions, that further includes claims defined as “linking” the linking claims must be examined and if allowed the restriction requirement withdrawn. See MPEP 809, 809.02(a), 809.03, and 819.03(d). As set forth in MPEP 809.03:

Where an application includes claims to distinct inventions as well as linking claims restriction can nevertheless be required.

...

The linking claims must be examined with and thus are considered part of the invention elected. When all claims directed to the elected invention are allowable should any linking claim be allowable the restriction requirement between the linked inventions must be withdrawn. Any claim(s) directed to the nonelected invention(s), previously withdrawn from consideration, which depends from or requires all the limitations of the allowable linking claim must be rejoined and will be fully examined for patentability in accordance with 37 C.F.R § 1.104.

Based on the clear path provided from the above passage and outlined in the MPEP sections 809, 809.02(a), 809.03, and 819.03(d) the Applicant in certain circumstances may be required to elect an individual invention, but upon allowance of the individual invention along with a linking claim, the non-elected invention must be rejoined and allowed to proceed through examination for patentability. In the present application, the Applicant elects with traverse claims to invention II, including the linking claims 19, 20, and 21 for further examination by the Examiner. If upon allowance of the claims to invention II and the linking claims 19, 20, or 21 it is respectfully requested that the Examiner rejoin the non-elected claims directed to invention I for patentability.

3. Conclusion

If, in the opinion of the Examiner, a telephone conference would expedite prosecution of the instant application, the Examiner is encouraged to all the undersigned at the number listed below.

Respectfully submitted,
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